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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

C. D. KASMIR AND JERRY A. CANDY

SOLOMON FISHER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND THIRD CIRCUITS

BRIEF FOR THE PETITIONERS IN NO. 74-611 AND FOR THE RESPONDENTS IN NO. 74-18

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–611

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

C. D. KASMIR AND JERRY A. CANDY

No. 74–18

SOLOMON FISHER, ET AL., PETITIONERS

v.

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BRIEF FOR THE PETITIONERS IN NO. 74–611 AND FOR THE RESPONDENTS IN NO. 74–18

OPINIONS BELOW

No. 74–611. The order of the district court (Pet. App. A 1A) is not reported. There is no written opinion of the district court. The opinion of the court of appeals (Pet. App. B 2A–23A) is reported at 499 F. 2d 444.

No. 74–18. The memorandum and order of the district court (Pet. App. A A1–A7) are reported at 352 F. Supp. 731. The opinion of the court of appeals (Pet. App. B A8–A44) is reported at 500 F. 2d 683.

JURISDICTION

No. 74–611. The judgment of the court of appeals (Pet. App. C 24A) was entered on August 21, 1974. The petition for a writ of certiorari was filed on November 18, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

No. 74–18. The judgment of the court of appeals was entered on June 7, 1974. The petition for a writ of certiorari was filed on July 26, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. *Nos. 74–611 and 74–18.* Whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's prior tax returns, where, upon their becoming aware that the claimant was the subject of a tax investigation, the accountant handed over the papers to the claimant, who then turned them over to his attorney.

2. *No. 74–611.* If the client's privilege against self-incrimination is available as a bar to production of

his accountant's workpapers in these circumstances, whether the claimant's attorney can properly invoke his client's privilege.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portion of the Fifth Amendment of the United States Constitution states:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, provides in pertinent part as follows:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to ap-

pear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT

These consolidated cases present the identical question whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's prior tax returns. In both cases, the accountant handed over his workpapers to the claimant who then turned them over to his attorney, after the commencement of a tax investigation of the claimant. In No. 74–611, the Fifth Circuit held that the Fifth Amendment was available to bar production of such workpapers. In No. 74–18, the Third Circuit upheld the government's position that the privilege is not applicable. Because of the Fifth Circuit's holding as to the availability of the privilege, there is a second question presented in No. 74–611 concerning the attorney's standing to invoke his client's claim of privilege.

That court further held that the claimant's attorney can invoke his client's privilege.

In view of the common issue, the Court has consolidated these cases for argument. Accordingly, in order to present our argument in the factual context of both cases, we are filing this single brief for the government, as petitioner in No. 74–611, and as respondent in No. 74–18.

No. 74–611. On January 3, 1973, two special agents of the Internal Revenue Service interviewed Dr. Edward Mason in his office. The agents advised Dr. Mason that his income tax returns for the years 1969, 1970, and 1971 were under investigation and gave him *Miranda* warnings. They thereupon conducted a two-hour interview of Dr. Mason concerning his personal background, financial dealings and the manner in which his records were kept. During the visit, one of the agents requested permission to examine Mason's personal books and records and Dr. Mason complied with the request. The agent only casually examined the records to ascertain whether they were complete and he stated that he thought some were missing. Dr. Mason replied that if any records were missing, they would be at the accountant's office (Pet. App. B 2A–3A; A. 38–39).

Dr. Mason thereupon called his accountant, Jerry A. Candy, whose firm had been retained by him and his wife to prepare their tax returns for the years 1969, 1970, and 1971. Candy advised Dr. Mason not to show his records to the agents. After his telephone

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conversation with Candy, Dr. Mason initially stated to the agents that he was undecided whether or not to furnish his records to them. However, he ultimately followed his accountant's advice and denied them further access to his records (Pet. App. B 3A; A. 39–40).

Following Dr. Mason's telephone call, his accountant Candy immediately called C. D. Kasmir, an attorney, and informed him of the situation (A. 52, 60). Kasmir had not previously represented Dr. Mason. However, Kasmir promptly telephoned Dr. Mason and advised him not to say anything or to give the agents any records. During this telephone call, Dr. Mason retained Kasmir as his legal representative (A. 61–62). Immediately after speaking to Kasmir, Dr. Mason withdrew the records which he had placed before the agents and terminated the interview at approximately four o'clock in the afternoon (Pet. App. B 3A; A. 41).

Early the next morning, at 7:30 a.m., Candy delivered an assortment of records and documents to the office of Dr. Mason (A. 53). These records included the workpapers of the accounting firm which employed Candy and miscellaneous documents relating to the preparation of Dr. Mason's income tax returns for 1969, 1970 and 1971.[1] Dr. Mason signed a receipt for the records and immediately turned them over to

[1] The accountant testified that the records turned over to Dr. Mason included accountant's workpapers, and other miscellaneous data and correspondence described in the summons (A. 56).

Kasmir, who had arranged to be present at Dr. Mason's office that morning (A. 61). Later that same day, Special Agent Mabrey called the accountant Candy to arrange a meeting to examine his records with respect to the preparation of Dr. Mason's tax returns. The accountant told Mabrey that he did not have the records he was seeking, and that they were in the possession of Kasmir (A. 47).

On the following day, Agent Mabrey served internal revenue summonses on Candy and Kasmir pursuant to Section 7602 of the Internal Revenue Code of 1954 (A. 46, 81–84). The summons to Kasmir (A. 83) sought the production of specified records of the accounting firm which had been turned over to him the previous morning (A. 53).[2] The summons to Candy (A. 81) sought his testimony concerning these workpapers and documents. Both Candy and Kasmir appeared before Agent Mabrey but refused to comply with the summonses (A. 43). Candy stated that he was not in possession of any of the records sought by

[2] The documents and records sought by the summons were as follows (A. 81, 83):

1. Accountant's workpapers pertaining to Dr. E. J. Mason's books and records of 1969, 1970 and 1971.

2. Retained copies of E. J. Mason's income tax returns for 1969, 1970 and 1971.

3. Retained copies of reports and other correspondence between Tannebaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970 and 1971.

As the court of appeals noted (Pet. App. B 3A, n. 1), the government did not seek production of the documents which Dr. Mason permitted the agents to examine during their initial visit.

the summons at the time it was served upon him and invoked the attorney-client privilege in refusing to answer any questions (A. 85). Kasmir relied upon the attorney-client privilege and the Fourth and Fifth Amendments in refusing to produce the records (Pet. App. B 3A–4A; A. 86).

Upon Candy's and Kasmir's refusal to comply with the summonses, the government and Special Agent Mabrey commenced this enforcement action in the United States District Court for the Northern District of Texas (A. 4–8). An affidavit of Special Agent Mabrey submitted to the district court stated that: "It is necessary to examine the books, records and other papers demanded by the summonses * * * [in] order to ascertain the correctness of income tax returns filed by Edward J. Mason and Rae A. Mason for the years 1969 through 1971" (A. 8). After a hearing, at which Candy testified that it was not his practice, as an accountant, to turn over such records at the request of a client (A. 54), the district court ordered the summonses enforced, directing Kasmir to produce the records and Candy to testify concerning them. The court found that the records sought belonged to the accounting firm, that the taxpayer could not "make them a part of his records by requesting the accountant to deliver them to him," and that the records were in the possession of Kasmir at the time of the service of the summons (Pet. App. A 1A; Pet. App. B 3A–4A; A. 77).

With one judge dissenting, the court of appeals reversed the district court's order insofar as it required

Kasmir to produce the documents.[3] While recognizing that the actions of the taxpayer, his accountant and his attorney were an attempt to put the requested records beyond the reach of the Internal Revenue Service, the court held that the taxpayer had acquired rightful possession because the transfer took place prior to service of the summons and that he retained constructive possession of the records after their transfer to the attorney. The court reasoned that the privilege would have been available had the taxpayer retained his accountant's workpapers, and that the taxpayer's rights were not decreased by his transfer of the documents to his attorney (Pet. App. B 13A–15A). The court of appeals further held that even though the taxpayer had not appeared before the district court to claim the privilege against self-incrimination, the attorney had standing to assert his client's Fifth Amendment privilege (Pet. App. B 19A–20A).

The dissenting judge was of the view that a taxpayer has no legitimate expectation of personal privacy with respect to his accountant's workpapers and therefore cannot assert the privilege against self-incrimination to bar their production. He concluded that there was no compulsion against the person of the taxpayer by requiring his lawyer to produce an accountant's records which the accountant placed in the

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[3] The court of appeals held that under *Couch* v. *United States*, 409 U.S. 322, the government "is entitled to enforcement of the summons served upon accountant Candy for his testimony concerning the sought-after documents" (Pet. App. B 20A).

taxpayer's hands "for a fleeting moment." The dissent further stated that the attorney-client privilege is not available "initially and directly as a strategem or device to place pre-existing documentary evidence beyond the reach of the law" (Pet. App. B 21A–23A).

No. 74–18. In late July 1971, Alan Feldman, a special agent of the Internal Revenue Service, made an appointment with Morris Goldsmith to discuss Goldsmith's tax liability for the years 1969 and 1970. On August 3, 1971, Goldsmith and his wife retained petitioner Solomon Fisher, an attorney, to represent them. Fisher thereupon called Feldman and advised him that Goldsmith would not appear for the appointment. On August 4, 1971, the Goldsmiths obtained certain records and papers from their accountant, Harold Berson, which were compiled by the accountant in connection with the preparation of their tax returns. These records, which dated back as far as 1959, included lists of income and expenses compiled by the accountant from cancelled checks and deposit receipts supplied by the Goldsmiths. They did not, however, include the checks and deposit records themselves. On August 17, 1971, less than two weeks after their receipt of the accountant's workpapers, the Goldsmiths turned them over to Fisher (Pet. App. A A1–A2; Pet. App. B A10–A11: A. 54a).

Subsequently, on October 22, 1971, Special Agent Feldman served a summons on the accountant, Berson, seeking production of records relating to the Goldsmiths' tax liability for the years in question. Berson indicated to the agent that he would attempt to get his

papers back from Goldsmith. However, when Berson appeared to answer the summons, he stated that he did not have the papers sought by Agent Feldman. Thereafter, on December 1, 1971, Agent Feldman served a summons on petitioner Fisher, directing production of the analyses of the Goldsmiths' receipts and disbursements for 1969 and 1970, which were prepared by their accountant, Harold Berson (Pet. App. A A2; Pet. App. B A11; A. 4a–5a).

Upon petitioner Fisher's refusal to permit Agent Feldman to inspect these papers, the government commenced this enforcement action in the United States District Court for the Eastern District of Pennsylvania, seeking compliance with the summons.[4] An affidavit of Agent Feldman appended to the government's petition to enforce the summons stated "[t]hat the testimony, records, documents, papers and information demanded by the summons served upon Solomon Fisher are necessary for the determination of the tax liability of Morris Goldsmith for the years 1969 and 1970" (A. 9a). In response, petitioner Fisher asserted that production of the accountant's workpapers would violate the Goldsmiths' Fifth Amendment privilege against self-incrimination (Pet. App. B A11–A12; A. 13a). At their request (A. 15a–16a), the district court permitted the Goldsmiths to inter-

[4] The summons also sought the production of copies of payroll tax returns for Mr. Goldsmith for the years 1969 and 1970 (A. 4a). However, the agent obtained these items from other sources and they were not sought in this enforcement proceeding (A. 30a).

vene in the proceeding for the purpose of invoking the Fifth Amendment privilege as a bar to Fisher's compliance with the summons (A. 73a).

After a hearing, the district court found (Pet. App. A A7) that the workpapers sought by the summons "were and are the property of the accountant" and that "[t]hey only left his possession after the taxpayer learned of the investigation." The court further found that the attorney-client privilege was not available to protect the accountant's workpapers from disclosure. It ordered enforcement of the summons (Pet. App. A A7).

The court of appeals affirmed after hearing reargument *en banc*. It held that the Fifth Amendment privilege against self-incrimination did not become available to bar production of the summoned workpapers upon the accountant's transfer of them to the Goldsmiths and their transfer of the papers to their attorney after learning of the tax investigation (Pet. App. B A8–A24). In a concurring opinion, Judge Gibbons emphasized the fact that petitioner Fisher's production of the accountant's workpapers would not require the compulsory production of evidence from the Goldsmiths or Fisher of a testimonial or communicative nature but that the papers could be authenticated by other means (Pet. App. A A24–A28). The single dissenting judge concluded that the privilege was available because: (1) the Goldsmiths could have asserted the privilege while their accountant's workpapers were in their possession; and (2) they maintained "constructive possession" over the papers upon

their transfer of them to their attorney. He would have vacated the judgment and remanded the case to the district court to determine whether the Goldsmiths had rightful possession of the accountant's workpapers (Pet. App. B A28–A44).

SUMMARY OF ARGUMENT

I

The principal issue in these cases involves the enforceability of internal revenue summonses seeking the production of workpapers originating with and belonging to accountants—papers which pertained to the accountants' preparation of their clients' tax returns. In our view, neither the transfer of the accountant's workpapers to the client nor their subsequent transfer by the client to his attorney created a privilege against self-incrimination which did not theretofore exist. As the Court reaffirmed in *Couch* v. *United States,* 409 U.S. 322, the Fifth Amendment privilege against self-incrimination is an intimate and personal right. Where the Court has extended the privilege to cover documentary evidence, it has repeatedly emphasized that only personal records are eligible for the claim. These decisions reflect the Court's consistent view that the privilege should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records" (*United States* v. *White,* 322 U.S. 694, 701).

Under the standards developed in this Court's decisions, the accountant's workpapers at issue are not the

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personal papers of the client and are therefore not subject to a claim of the privilege on behalf of the client. On numerous occasions, the Court has held that the Fifth Amendment is no bar to the required production of third-party records that might incriminate the claimant. Such third-party records cannot be transformed into the claimant's personal records simply by placing them in his custody. In determining whether records in the possession of the claimant are subject to the privilege, the Court has looked to the essential character of the documents, notwithstanding even claims by individuals to their legal title. For example, in *Grant* v. *United States,* 227 U.S. 74, the Court held that records of a dissolved corporation in the possession of an individual shareholder pursuant to his claim of exclusive title were not subject to the privilege against self-incrimination because the documents retained their "essential character" as corporate documents.

Similarly, in *Bellis* v. *United States,* 417 U.S. 85, the Court concluded that a member of a dissolved partnership could not claim the privilege to avoid producing partnership records which he had appropriated to his own possession prior to the issuance of a grand jury subpoena. The Court held that the records remained partnership records and that the claimant (and co-owner of the records) accordingly was holding them in a representative capacity rather than as his own private or personal papers.

Thus, even if the accountants in the present cases had transferred title in their workpapers to their cli-

ents, the privilege would not have become available, since the transfer of title would not have converted the accountant's papers to private papers of the taxpayer. *A fortiori,* where, as in each of these cases, the accountant simply handed over his workpapers to the taxpayer pursuant to what could at best be described as a gratuitious bailment and the taxpayer held them for only a brief period, the transfer could not have created a privilege which did not exist prior to the transfer to the taxpayer.

It would ill serve the policy underlying the privilege if a person under investigation could gather documentary evidence into his possession from third parties and then claim the privilege against self-incrimination with respect to such material. If the privilege could become available by means of such a simple expedient, the distinction developed by the Court between third-party records and private papers would be rendered meaningless. As Mr. Justice Holmes admonished for a unanimous Court in *Matter of Harris,* 221 U.S. 274, 279–280, "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story." Since the accountant's workpapers (compiled from unprivileged information previously disclosed to him by the client) are not the client's private papers, the client has no greater right to withhold them from proper legal process than does the custodian of corporate, organizational or partnership records or the possessor of any other pertinent unprivileged evidence.

2. The unavailability of the privilege against self-incrimination to convert accountant's workpapers to the client's private papers is further demonstrated by this Court's decision in *Schmerber* v. *California*, 384 U.S. 757. There, the Court held that the uncon-tested taking of a blood sample from a person under arrest for the purpose of conducting a chemical analysis of its alcoholic content was not barred by the privilege even though such evidence might serve to incriminate the accused. The Court stated that "[t]he distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it" (384 U.S. at 764). As in *Schmerber*, the production of the accountant's workpapers in these cases would not require the taxpayers to make any self-incriminating disclosures of a testimonial or communicative nature. In complying with the summonses, the taxpayers would not be authenticating the workpapers or testifying about them in any manner. Indeed, only the accountants could provide authentication and their testimony would not violate the taxpayers' Fifth Amendment privilege. Since it is only compulsion of testimony by the claimant which is prohibited by the Fifth Amendment, the privilege is unavailable to bar enforcement of the summons in this case.

3. The courts below properly recognized that no independent basis for the privilege against self-incrimination existed as a result of the taxpayers' transfer

of the workpapers to their attorneys. The availability of the privilege depends upon whether the taxpayer's initial possession of the accountant's workpapers was a sufficient basis for invoking the privilege. If, as we submit, it was not, the taxpayer's transfer of the accountant's workpapers to his attorney would not provide him with any greater protection under the Fifth Amendment.

Similarly, the courts of appeals correctly recognized that the attorney-client privilege is not available to bar production of the accountants' workpapers. That privilege applies only to confidential communications between attorney and client. Here, the accountants' workpapers did not constitute confidential communications between the taxpayers and their attorneys. They contain unprivileged information disclosed by the taxpayer to the accountant long before the commencement of any attorney-client relationship.

II

After concluding that the accountant's workpapers were protected by the taxpayer's privilege against self-incrimination, the court of appeals in No. 74–611 further held that the claimant's attorney could properly invoke his client's privilege. The question whether the claimant's attorney can properly invoke the client's Fifth Amendment privilege need be reached in No. 74–611 only if the Court concludes that the privilege is available with respect to the accountant's workpapers. Assuming *arguendo* that the privilege is available under these circumstances, we believe that there are important practical reasons why an attorney should not be able to invoke his client's privilege against self-

incrimination—at least where, as here, the client is available to intervene and assert the claim himself.

The privilege against self-incrimination is not an automatic bar to the securing of evidence but, like other privileges, may freely be waived by the person entitled to claim it. Moreover, a claim of the privilege need not be accepted on its face. In appropriate circumstances, the court may inquire into the basis of the claim. With respect to documentary evidence there may be need for a factual determination whether the documents sought are the private papers of the claimant. For all of these reasons, the claimant should be required to come forward and assert the privilege himself, and to answer pertinent questions of the court and counsel concerning the factual basis of the claim.

ARGUMENT

I. THE CLIENT'S PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT A BAR TO REQUIRED PRODUCTION OF HIS ACCOUNTANT'S WORKPAPERS WHICH HAVE BEEN PLACED IN THE CLIENT'S POSSESSION AND THEN TURNED OVER BY THE CLIENT TO HIS ATTORNEY

A. THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT APPLY TO POSSESSORY INTERESTS IN DOCUMENTS WHICH ARE NOT HELD IN A PURELY PERSONAL CAPACITY

1. The issue raised in these cases is of major importance to the conduct of federal tax investigations by the Internal Revenue Service. In Section 7602 of the Internal Revenue Code of 1954, Congress has authorized the Secretary of the Treasury or his delegate, in discharging his responsibility to administer and enforce the revenue laws "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * * [and] [t]o summon * * * any person having possession, custody, or care of books of account * * * or any other person * * * to appear before the Secretary * * * at a time and place named in the summons and to produce such books, papers, records, or other data, * * * as may be relevant or material to such inquiry * * *." Such summonses are administratively issued, and the Internal Revenue Service can seek their enforcement in the federal courts. Sections 7402(b) and 7604(a) of the Code. As the Court observed in *United States* v. *Bisceglia,* No. 73–1245, decided February 19, 1975, slip op. 5, "[t]he purpose of the statutes is not to accuse, but to inquire. Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system * * *."

While records sought by an internal revenue summons may tend to incriminate the taxpayer under investigation, the decisions of this Court have established that the Fifth Amendment privilege against self-incrimination is not available to prevent the compulsory production of documents unless they are the private papers of the claimant and are in his possession. These decisions reflect the Court's consistent view that the privilege should be "limited to its historic function of protecting only the natural individ-

ual from compulsory incrimination through his own testimony or personal records." *United States* v. *White,* 322 U.S. 694, 701.

In *Couch* v. *United States,* 409 U.S. 322, 327, 328, the Court reaffirmed that the Fifth Amendment privilege is an "intimate and personal" right which "adheres basically to the person, not to information that may incriminate him." In referring to its previous holding in *Boyd* v. *United States,* 116 U.S. 616, that a person could not be compelled to produce his private papers [5] that might tend to incriminate him, the Court there pointed out that "[a] later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at*

[5] Petitioners in No. 74–18 attempt to characterize (Br. 18) the holding in *Boyd* as extending the privilege to records prepared by a third party. However, while the document sought in *Boyd* was an invoice issued to the claimant's partnership by a third party, the Court has subsequently explained that the question whether the invoice was a private business record was not raised in that case. *Bellis* v. *United States*, 417 U.S. 85, 95, n. 2. It was treated as private by the parties (with the government arguing instead that the privilege did not apply to *in rem* proceedings, see *Shapiro* v. *United States*, 335 U.S. 1, 33, n. 42). "The Court therefore decided the case on the premise that it involved the 'compulsory production of a man's private papers.'" 417 U.S. at 95, n. 2. Thus, in extracting the essential passage from the *Boyd* decision which was descriptive of its holding, the Court in *Couch* cited *Boyd* as deciding that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" (116 U.S. at 630) would violate the Fourth and Fifth Amendments. See 409 U.S. at 330. See also *Wilson* v. *United States*, 221 U.S. 361, 380; *United States* v. *Onassis*, 125 F. Supp. 190, 208 (D. D.C.).

least in his possession in a purely personal capacity.' United States v. *White,* 322 U.S. 694, 699 (1944) (Emphasis added.)" 409 U.S. at 330, n. 10. Since *Boyd* did not "address or contemplate the divergence of ownership and possession" (409 U.S. at 330), the Court rejected its application in *Couch,* where the owner of books and records had transferred them to an accountant. In these circumstances, the Court concluded, "the ingredient of personal compulsion against an accused is lacking" (409 U.S. at 329) and the taxpayer-claimant therefore could not invoke the privilege as a bar to the compelled production of her records by the accountant.

While *Couch* involved absence of possession by the claimant of documents owned by him, the privilege is similarly unavailable in the converse situation where the claimant has physical possession but cannot assert that they are his own personal papers. In these circumstances, the claimant's possession is custodial rather than personal.[6] Accordingly, as was recently noted in *Bellis* v. *United States,* 417 U.S. 85, 88–90, a long line of this Court's decisions holds that an individual cannot rely upon the privilege to avoid producing the records of a collective entity (such as a corporation, unincorporated association or partnership) which are in his possession in a representative capac-

[6] Of course, if the claimant can assert neither possession nor ownership of papers, they are simply third-party records with respect to which the privilege is unavailable. See, *e.g., Donaldson* v. *United States*, 400 U.S. 517, 537 (Douglas, J., concurring); *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 55. See also *Johnson* v. *United States*, 228 U.S. 457, 458.

ity, even if those records would incriminate him personally. See, *e.g., United States* v. *White, supra; Wilson* v. *United States,* 221 U.S. 361.

2. In applying the rule that records in the possession of the claimant are not subject to the privilege unless he can demonstrate that they are his personal papers, the Court has been careful to classify documents in accordance with their essential character, notwithstanding claims by individuals to legal title of the documents. For example, in *Wheeler* v. *United States,* 226 U.S. 478, 482–483, and *Grant* v. *United States,* 227 U.S. 74, 76–77, where corporations had been dissolved by the time the subpoenas had been served and individual shareholders asserted ownership rights in the corporate records sought,[7] the Court nevertheless rejected their claims of privilege. It held that the documents retained their "essential character" as corporate documents (226 U.S. at 490; 227 U.S. at 80) and "were still impressed with the incidents attending corporate documents" (226 U.S. at 490), and therefore did not qualify as private papers. This was the case even though the individual then in possession (or constructive possession, in *Grant*) of them also claimed, and was assumed by the Court, to be their owner (226 U.S. at 490; 227 U.S. at 80).

Similarly, in *Bellis* v. *United States, supra,* a member of a dissolved partnership could not claim the privilege to avoid production of records belonging to his former partnership which he had appropriated to his

[7] In *Grant*, the subpoena was served on the attorney for the corporation's sole stockholder. See 227 U.S. at 76–77.

own possession prior to the issuance of a grand jury subpoena. This Court held that the records remained partnership records, in which the other partners had important legal rights, and that the claimant accordingly was holding them in a representative capacity rather than as his own private or personal papers (see 417 U.S. at 97–99).

Wheeler, Grant, and *Bellis* establish that documents do not become "private" or "personal" for Fifth Amendment purposes merely because the claimant physically possesses them, even if that possession is under a claim of title. Here, the records at issue are accountants' workpapers which were created by the taxpayer's accountant in each case and were owned and maintained by the accountant until the commencement of the investigations. They obviously were not private papers of the taxpayers and, we submit, did not become so upon being handed over by the accountants to the taxpayers or upon being handed over by the latter to their attorneys. We turn now to a detailed consideration of the essential character of the papers at issue and whether their transfers effected a change in that character for purposes of the Fifth Amendment.

B. THE CLIENT'S PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT EXTEND TO ACCOUNTANT'S WORKPAPERS WHICH ARE PLACED IN THE CUSTODY OF THE TAXPAYER-CLIENT

1. The court of appeals in No. 74–611 correctly acknowledged (Pet. App. B 13a) that the taxpayer could have claimed no privilege of self-incrimination

in the accountant's workpapers had the summons been served while they were held by the accountant. *Couch* established that a taxpayer's own books and records are not protected when they are in the possession of an accountant, and it follows *a fortiori* that compelled production of accountant's workpapers which belonged to the accountant and were never in the possession of the taxpayer-claimant would not constitute "extortion of information from the accused himself that offends our sense of justice." *Couch* v. *United States, supra,* 409 U.S. at 328. Indeed, this result is merely an application of the well-settled rule that third-party records are not subject to a claim of privilege. See n. 6, *supra.* Simply put, "[t]here is no right to be free from incrimination by the records or testimony of others." *Donaldson* v. *United States, supra,* 400 U.S. at 537 (Douglas, J., concurring).[8]

Although there is no dispute concerning the correctness of the preceding proposition, the Fifth Circuit went on to state that: "It is likewise clear from *Couch* that at the time the taxpayer obtained actual possession of the records, the day before the summons was served, he was in the position to assert his Fifth Amendment privilege, if the summons had then been served" (Pet. App. B 13A). In the court of appeals' view, had the taxpayer at that point placed the ma-

[8] There is of course no confidential accountant-client privilege under federal law and no state-created privilege has been recognized in federal cases. See *Couch* v. *United States, supra,* 409 U.S. at 335, and cases cited therein.

terial in a safe under his control, "he could have successfully invoked the privilege by relying upon his constructive possession" (*ibid.*).

This statement by the court of appeals in No. 74–611 seriously misinterprets the teaching of *Couch.* That case dealt with books and records which belonged to and originated with the taxpayer, and as to which the privilege presumably would have been available to her had she not relinquished possession of them. See 409 U.S. at 334 n. 18. In rejecting her claim of privilege with respect to records of the taxpayer which she had disclosed to her accountant and permitted him to maintain continuously in his possession, the Court emphasized that the accountant, and not the taxpayer, was the only person who would be subject to the compulsion of the summons. Once the taxpayer had voluntarily removed her records from that "'private enclave where [she] may lead a private life * * *'" (*Murphy* v. *Waterfront Comm'n.,* 378 U.S. 52, 55, quoting *United States* v. *Grunewald,* 233 F. 2d 556, 581–582 (C.A. 2) (Frank, J., dissenting), reversed, 353 U.S. 391), "the ingredient of personal compulsion against an accused [was] lacking" (409 U.S. at 329). See 409 U.S. at 338 (Brennan, J., concurring).

While the lack of possession by the owner of documents was significant in the circumstances presented in *Couch,* the Court's opinion in that case does not support the converse conclusion of the court of appeals in No. 74–611 that physical possession alone is a sufficient basis for invoking the privilege with re-

spect to documentary evidence.[9] It would ill serve the policy underlying the privilege if a person under investigation could gather documentary evidence into his possession from third parties and then claim the privilege against self-incrimination with respect to such material. If the privilege could become available by means of such a simple expedient, the distinction developed by the Court between third-party records and private papers would be rendered meaningless. As Mr. Justice Holmes admonished for a unanimous Court in *Matter of Harris,* 221 U.S. 274, 279–280, "[t]he right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

Indeed, the present cases would appear to follow *a fortiori* from *Wheeler* v. *United States,* 226 U.S. 478, and *Grant* v. *United States,* 227 U.S. 74, which held that even if the claimant could assert both a proprietary and a possessory interest in documents which are not his personal papers, such documents are not subject to a claim of the privilege. That principle was in no way repudiated by *Couch* and was subsequently reaffirmed in *Bellis* v. *United States, supra,* 417 U.S. at 97, n. 8, as the basis for denying a claim of privilege by a co-owner in possession of the records of a partnership or other unincorporated association. And in *Grant, supra,* the records of a dissolved corporation which were in the possession of its

[9] Indeed, the present cases, no less than *Couch*, involve "the divergence of ownership and possession" (409 U.S. at 330). See n. 10, *infra.*

sole shareholder under a claim of exclusive title were held not subject to the privilege because of their "essential character" as corporate documents. Thus, even if the accountants in the present cases had transferred title in their workpapers to the taxpayer, the privilege would not have become available; the transfer of title would not have converted the character of the accountants' workpapers to the private papers of the taxpayer. Here, where the accountant in each case simply handed over his workpapers to the taxpayer pursuant to what could at best be described as a gratuitous bailment,[10] the transfer surely could not create

[10] There was no transfer of title of the accountant's workpapers in either of these cases. In No. 74–611, the district court found that the records at issue "belong to the accounting firm of Tannebaum, Binder and Lewis and are in possession of the respondent, C. D. Kasmir * * *" (A. 93). This finding was left undisturbed by the court of appeals. Indeed, the only evidence of the transfer of the accountant's workpapers to the taxpayer was a receipt addressed to the accountant and signed by the taxpayer, which stated as follows (A. 89):

"Please accept this as receipt for the following files of Dr. E. J. Mason: 1969, 1970 and 1971 Tax Files, Quarterly Tax Files, and Bookkeeping Files. 1970 and 1971 Financial Statements Files and 1969 Cash Disbursements.

"(s) E. J. Mason
"Dr. E. J. Mason."

Similarly, in No. 74–18, the district court found that the workpapers "were and are the property of the accountant" (Pet. App. A A7). While the accountant Berson had testified (A. 55a) that he believed the papers belonged to the Goldsmiths, the court found it was not bound by such assertions (Pet. App. A A6). Indeed, Section 9.11, 63 Pennsylvania Statutes Ann., specifically requires that an accountant's "statements, records, schedules, working papers and memoranda * * * remain the property of such certified public accountant in the absence of an express agreement between the certified public accountant and the client to the contrary." Nothing in the record supports the existence of such an agreement between Berson and the Goldsmiths.

a privilege which theretofore did not exist.[11] The Fifth Circuit in No. 74–611 therefore erred in concluding that the accountant's workpapers would have been privileged in the hands of the taxpayer.

In light of the foregoing, it is not surprising that, apart from the decision below in No. 74–611, the federal appellate courts that have considered the applicability of the privilege to accountant's workpapers transferred to the taxpayer or his attorney either directly or indirectly have, with a single exception, uniformly rejected any claim of privilege on behalf of the taxpayer.[12] Like the dissenting judge in No. 74–611, we see little difference between the facts here and the situation where a taxpayer arranges for his

[11] The court of appeals' further statement in No. 74–611 (Pet. App. B 13A) that if the taxpayer had placed his accountant's workpapers in a safe he could have invoked the privilege by relying upon his constructive possession is premised upon its erroneous initial assumption that the taxpayer's physical possession was a sufficient basis for invoking the privilege.

[12] In addition to the decision below in No. 74–18, see *e.g.*, *Deck* v. *United States*, 339 F.2d 739 (C.A.D.C.) (workpapers transferred first to the taxpayer and then to his attorney); *United States* v. *Zakutansky*, 401 F.2d 68 (C.A. 7), certiorari denied, 393 U.S. 1021 (accountant's workpapers transferred to taxpayer); *United States* v. *Widelski*, 452 F.2d 1 (C.A. 6), certiorari denied, 406 U.S. 918 (accountant's workpapers transferred to taxpayer); *United States* v. *White*, 477 F.2d 757 (C.A. 5), affirmed *per curiam*, 487 F.2d 1335 (*en banc*), certiorari denied, 419 U.S. 872 (accountant's workpapers transferred to attorney).

accountant to transfer the accountant's workpapers directly to his attorney—a situation in which the Fifth Circuit reached the opposite result in *United States* v. *White*, 477 F.2d 757, affirmed *per curiam*, 487 F.2d 1335 (*en blanc*), certiorari denied, 419 U.S. 872. The fact that the papers here, unlike those in *White*, momentarily passed through the hands of the taxpayer in their journey from the accountant to the attorney is, in the words of the dissent below, a distinction "exalting form over substance * * *" (Pet. App. B 23A). The availability of the privilege against self-incrimination should not turn upon such a purely formalistic distinction.

The single contrary appellate authority is *United States* v. *Cohen*, 388 F.2d 464 (C.A. 9). There, in anticipation of an internal revenue summons, the taxpayer had acquired his accountant's workpapers and thereafter claimed the privilege. Relying upon the testimony of the accountant that he considered all papers relating to his client's affairs to be theirs to command and that it was his unvarying practice to deliver such papers to the client when requested, the Ninth Circuit upheld the claim of the privilege, concluding that the taxpaper's possession "[could] not fairly be characterized as wrongful" (388 F.2d at 470).

While the present cases can be distinguished factually from *Cohen* on the basis of the practice of the accountant with respect to his workpapers *vis-a-vis* his client, the ownership of the papers, and the nature

of the taxpayer's possession of the papers,[13] we believe that the Ninth Circuit's decision is erroneous on the broader ground that accountant's workpapers cannot be transformed into the private papers of his client.[14] As we have pointed out *supra,* pp. 22–23, the decisions of this Court in *Grant, Wheeler,* and *Bellis* have made it clear that the question is not whether the claimant's

[13] In No. 74–611, the accountant testified that it was not his practice to turn over his workpapers at the request of a client (A. 54). Moreover, the district court found that the accounting firm continued to own the records (A. 93). Finally, the taxpayer's possession of his accountant's workpapers was only momentary since he immediately passed them on to his attorney, Kasmir.

While the taxpayers in No. 74–18 held their accountant's workpapers for 12 days before passing them on to their attorney, the court of appeals correctly described that possession as "fleeting and transitory" (Pet. App. B A24). Moreover, while petitioners emphasize (Br. 20–22) the accountant's testimony in No. 74–18 that he would regularly turn over an accumulation of records and papers to his clients every few years (A. 53a), some of the papers that he turned over to them in August 1971 dated back to the year 1959 (A. 54a). There, as in No. 74–611, the district court found that the records continued to be the property of the accountant even after the transfer (Pet. App. A A6–A7).

[14] The reference to *Cohen* by this Court in *Couch, supra,* 409 U.S. at 330, n. 12, noted that "the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate." But the Court further noted (*ibid.*) that it was not deciding "what qualifies as rightful possession enabling the possessor to assert the privilege." On the latter issue the Ninth Circuit's view has been criticized by other courts of appeals. See *United States* v. *Widelski,* 452 F. 2d 1, 5 (C.A. 6), certiorari denied, 406 U.S. 918, and cases cited therein. Moreover, the Ninth Circuit's statement in *Cohen* that the privilege does not depend upon "the degree of privacy which attended the creation or maintenance of particular records" (388 F. 2d at 471) is contrary to both *Couch* and *Bellis.*

possession of the documents is wrongful as petitioners in No. 74–18 suggest (Br. 20–21), but whether they are his private papers. Contrary to petitioners' argument in No. 74–18 (Br. 17–20), workpapers prepared by an outside accountant are not private papers of the client to whom they pertain.[15] The mere fact that such records may reflect the taxpayer's financial transactions does not in itself create a Fifth Amendment privilege to bar their disclosure. See, *e.g., Couch* v. *United States, supra; California Bankers Assn.* v. *Shultz,* 416 U.S. 21; *Donaldson* v. *United States,* 400 U.S. 517, 537 (Douglas, J., concurring). And, since the workpapers at issue were prepared by the accountants on the basis of information disclosed to them by their taxpayer-clients for purposes of preparation of the clients' tax returns, the following analysis by this Court in *Couch* concerning a taxpayer's own records furnished to an accountant for those purposes is at least equally applicable here (409 U.S. at 335–336, footnote omitted):

> * * * [T]here can be little expectation of privacy where records are handed to an ac-

[15] Petitioners in No. 74–18 argue (Br. 18) that documents can be the private papers of the claimant even if they are written by another person. We do not contend to the contrary. However, for purposes of the Fifth Amendment, there is a difference between records prepared by the taxpayer's full-time employee with respect to which he does not relinquish possession and control in a non-privileged relationship and records prepared by an outside accountant. See *Couch* v. *United States, supra,* 409 U.S. at 334–335 and n. 18. Contrary to petitioner's argument in No. 74–18 (Br. 17), the Court in *Couch* deemed it "significant" that "the accountant himself worked neither in petitioner's office nor as her employee" (409 U.S. at 334 and n. 18).

countant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he willfully assists in the preparation of a false return. 26 U.S.C. § 7206(2). His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality.

Moreover, the Court noted in *Couch* that no confidential accountant-client privilege exists under federal law and no state-created privilege has been recognized in federal cases (see 409 U.S. at 335, and cases cited therein). Thus, whether the accountant's workpapers are in the hands of his client or of the accountant, the client cannot prevent his accountant from testifying about them or claim a privilege of confidential communication to prevent their production, because the law does not recognize any significant interest of privacy by the client in his accountant's workpapers.

There is no reason for a different rule under the Fifth Amendment—a rule that would protect from production accountant's workpapers in the hands of

the client, even though the client could not prevent his accountant's testimony with respect to such records or the information they contain. The transfer of the workpapers to the client's custody does not change their essential nature; they remain a compilation by the accountant of unprivileged information previously disclosed to him by the client. Although the client may have a Fifth Amendment privilege to refuse to authenticate the workpapers or testify about their tents (see point 2, *infra,* pp. 33–35), the papers themselves are not converted into part of the "private enclave where he may lead a private life" merely by being placed in his possession. Since they are not his private papers, he has no greater right to withhold them from proper legal process than does the custodian of corporate, organizational or partnership records (see *Wheeler, Grant, White* and *Bellis, supra*) or, indeed, the possessor of any other pertinent evidence (see *Warden* v. *Hayden,* 387 U.S. 294, 302–303).

2. The unavailability of the privilege against self-incrimination to convert accountant's workpapers to the client's private papers is further demonstrated by this Court's decision in *Schmerber* v. *California,* 384 U.S. 757. There, the Court held that the unconsented taking of a blood sample from a person under arrest for the purpose of conducting a chemical analysis of its alcoholic content was not barred by the privilege. Although such evidence may serve to incriminate the accused, the Court stated that "[t]he distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the

source of 'real or physical evidence' does not violate it" (384 U.S. at 764). Since admission of the blood test evidence did not involve either testimony or any communicative act or writing by the claimant, it was not barred by the privilege against self-incrimination. See also *Warden* v. *Hayden, supra* (clothing); *United States* v. *Dionisio,* 410 U.S. 1, 5–7 (voice exemplars); *United States* v. *Mara,* 410 U.S. 19, 21–22 (handwriting exemplars).

As in *Schmerber,* the production of the accountants' workpapers in these cases would not require the taxpapers to make any self-incriminating disclosures of a testimonial or communicative nature. (The taxpayers' earlier communications to the accountants, on which the workpapers were based, were, of course, neither privileged nor compelled by the government.) In complying with the summons, the taxpayers would not be authenticating the workpapers or testifying about them in any manner. It is that testimonial compulsion which is prohibited by the Fifth Amendment. As the Court stated in *United States* v. *White, supra,* 322 U.S. at 698 (emphasis added), the privilege "is designed to prevent the use of the legal process to force from the lips of the accused individual the evidence necessary to convict him or *to force him to produce and authenticate any personal documents or effects that might incriminate him.*"

In these cases, only the accountant could provide authentication of his workpapers and his testimonial communication would not violate the taxpayer's privilege against self-incrimination. Indeed, the sole testimonial disclosure which would accompany the tax-

payer's production of the summoned workpapers would be the admission that they were in his possession, a fact that is already admitted and which, in any event, is of no evidentiary significance and would therefore not be incriminating. Accordingly, since "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused" (*Schmerber* v. *California, supra,* 384 U.S. at 765) would accompany production of the accountant's workpapers, the privilege is unavailable to bar enforcement of the summons. See also *Couch* v. *United States, supra,* 409 U.S. at 329; Pet. App. B (No. 74–18), pp. A24–A28 (Gibbons, J., concurring below); VIII Wigmore, *Evidence,* § 2263, p. 379 (McNaughton rev., 1961).

C. THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT ARISE AS A RESULT OF THE TAXPAYER'S TRANSFER OF THE ACCOUNTANT'S WORKPAPERS TO HIS ATTORNEY

The foregoing discussion has shown that the privilege against self-incrimination would not have been available if the taxpayers had retained possession of the accountant's workpapers in each case and the summons had been served upon the taxpayers. The remaining question with respect to the production of the accountants' workpapers is whether the taxpayers' transfer of them to their attorneys barred their required production under either the Fifth Amendment or some other legally recognized privilege.

1. The court of appeals in No. 74–611 properly recognized (Pet. App. B 15A–16A) that no independent basis for the privilege against self-incrimination existed as a result of the taxpayer's transfer of the documents to his attorney. As that court stated (Pet.

App. B 15A), "We reject the notion, as we did in *White* [477 F. 2d 757 (C.A. 5), affrmed *per curiam,* 487 F. 2d 1335 (*en banc*)] that a Fifth Amendment privilege in the taxpayer can somehow be *created* when evidence finds its way into [the taxpayer's] attorney's hands" (emphasis in original).

We agree with the court below in No. 74–611 that the transfer of the accountant's workpapers to the attorney should neither enlarge nor decrease whatever Fifth Amendment privilege the taxpayer could originally assert when they were in his possession.[16] See VIII Wigmore, *Evidence* § 2307, pp. 591–594 (McNaughton rev., 1961). Thus, as petitioners in No. 74–18 acknowledge (Br. 23–27), the availability of the privilege depends upon whether the taxpayer's initial possession of the accountant's workpapers was a sufficient basis for invoking the privilege. If, as we have submitted, it was not, the taxpayer's transfer of the accountant's papers to his attorney would not provide him with any greater protection under the Fifth Amendment.

2. The court of appeals in No. 74–611 correctly recognized that the attorney-client privilege is "admittedly not available" to bar production of the accountant's workpapers (Pet. App. B 17A).[17] That

[16] Thus, if the taxpayer had transferred his own private papers to his attorney for purposes of preparing his defense, the Fifth Amendment privilege would have protected them from disclosure.

[17] Respondents in No. 74–611 conceded in their brief in the court of appeals (p. 7, n. 1) that the attorney-client privilege was not available.

privilege applies only to confidential communications between attorney and client and does not encompass communications by a third party unless he is acting merely as an agent in transmitting the communication from the client to the attorney.[18] See VIII Wigmore, *Evidence,* § 2317, p. 619 (McNaughton rev., 1961); *Bouschor* v. *United States,* 316 F. 2d 451, 456–458 (C.A. 8), and cases cited therein; *United States* v. *Goldfarb,* 328 F. 2d 280 (C.A. 6), certiorari denied, 377 U.S. 976; *United States* v. *Threlkeld,* 241 F. Supp. 324 (W.D. Tenn.).

The accountant's workpapers in these cases do not constitute confidential communications between the taxpayer and his lawyer. They contain unprivileged information (see *Couch* v. *United States, supra,* 409 U.S. at 335) disclosed by the taxpayer to the accountant long before the commencement of the attorney-client relationship. Cf. *United States* v. *Kovel,* 296 F. 2d 918 (C.A. 2). There is accordingly no basis for the invocation of the attorney-client privilege with respect to the accountant's workpapers. Evidentiary materials not otherwise privileged cannot be made unavailable to proper investigatory or judicial process merely by being turned over to the custody of a lawyer.

3. Despite the conceded unavailability of the attorney-client privilege, the court of appeals in No.

[18] In No. 74–18, the court of appeals also stated that "[p]apers otherwise not endowed with Fifth Amendment protection cannot be transmuted into a privileged status merely because of the act of delivery to a lawyer" (Pet. App. B A23). The court noted that the petitioners in that case also disclaimed reliance on the attorney-client privilege (Pet. App. B A22).

74–611 concluded (Pet. App. B 17A–18A), and petitioners in No. 74–18 contend (Br. 25–27), that the existence of an "attorney-client relationship" gave the taxpayer a legitimate expectation of privacy with regard to the summoned workpapers. Observing that an attorney is forbidden by the American Bar Association's Disciplinary Rules of the Code of Professional Responsibility from knowingly disclosing his client's secrets or confidences, the Fifth Circuit stated that the attorney's possession of the summoned workpapers "helps to give substance to a Fifth Amendment privilege contention" (Pet. App. B 17A–18A).

There is, we submit, no basis for such an open-ended and novel expansion of the privilege against self-incrimination under the guise of the attorney-client relationship. Contrary to the court of appeals' suggestion, the disciplinary rules of the American Bar Association cannot create a privilege if none otherwise exists to bar required production of records. Indeed, Rule 4–2 of the same Code of Professional Responsibility to which the court below referred, and upon which petitioners in No. 74–18 rely (Br. 27), provides that "[t]he obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information * * * when required by law." See also *In re Grand Jury Appearance of Alvin S. Michaelson, Esq.*, C.A. 9, No. 74–3409, decided January 22, 1975, slip op. 16–17, certiorari denied, No. 74–1011 (May 19, 1975).

The fact that a person has retained counsel and transmitted potentially incriminating but unprivileged material to him does not immunize that material

from compulsory disclosure. If the rule were otherwise, the attorney-client privilege would largely be subsumed in a grossly expanded Fifth Amendment privilege encompassing the entire gamut of information and evidentiary material received by an attorney concerning his client. Attorneys would then become repositories of, and sanctuaries for, unprivileged material incriminatory to their clients—a result justified by neither the Fifth Amendment nor the attorney-client privilege."

II. EVEN IF THE CLIENT'S PRIVILEGE AGAINST SELF-INCRIMINATION WERE AVAILABLE AS A BAR TO PRODUCTION OF HIS ACCOUNTANT'S WORKPAPERS, THE CLAIMANT'S ATTORNEY COULD NOT INVOKE THE PRIVILEGE ON BEHALF OF THE CLIENT

After concluding that the accountant's workpapers were protected by the taxpayer's privilege against self-incrimination, the Fifth Circuit in No. 74–611 further held that the claimant's attorney, respondent Kasmir, could properly invoke his client's privilege. In so holding, the court acknowledged that "there is no unanimity among the courts in their answers to the question posed * * *." However, it ruled that "the realities of tax litigation require that the attorney be allowed to press his client's claim where the client

[19] Although petitioners in No. 74–18 invoke (Br. 23) their Sixth Amendment right to counsel as a basis for refusal to comply with the summons, that right has never been construed to bar disclosure of all evidence in the hands of an attorney. Moreover, since petitioners have no Fifth Amendment privilege in their accountant's workpapers, they are not, as they urge (Br. 24), being put to a choice between their privilege against self-incrimination and their right to counsel.

could successfully do so" (Pet. App. B 19A). Thus, the fact that the claimant, Dr. Mason, never appeared before the district court to invoke his privilege against self-incrimination was held not to render the claim unavailable.

The question whether the claimant's attorney can properly invoke his client's Fifth Amendment privilege need be reached in No. 74–611 only if the Court concludes, contrary to our contention, that the privilege is available with respect to the accountant's workpapers.[20] However, assuming *arguendo* that the privilege is available under these circumstances, we do not believe that the "realities" of tax litigation or any other type of litigation support the conclusion of the court of appeals that the claimant's attorney may invoke the privilege on behalf of his client. Indeed, the decisions of this Court establish precisely the contrary proposition, that the privilege against self-incrimination—an "intimate and personal one" adhering to the person of the claimant (*Couch* v. *United States, supra,* 409 U.S. at 327)—can only be asserted by the claimant. For example, in *Hale* v. *Henkel,* 201 U.S. 43, 69–70, the Court observed that the Fifth Amendment privilege "is purely a personal privilege of the witness" and "was never intended to permit [the witness] to plead the fact that some third person might be incriminated by his testimony, *even though he were the agent of such person*" (emphasis added). See also *McAlister* v. *Henkel,* 201 U.S. 90, 91; *United*

[20] This question is not presented in No. 74–18 because the taxpayers there intervened in the district court and asserted the privilege for themselves.

States v. *White, supra,* 322 U.S. at 704; *Rogers* v. *United States,* 340 U.S. 367, 371.[21]

In our view, there are important practical reasons why an attorney should not be permitted to invoke his client's privilege against self-incrimination—at least where, as here, the client is available to intervene and assert the claim for himself. The statement of the court of appeals (Pet. App. B 20A) that there is "no reason to require" the personal appearance of the claimant before the court, overlooks the fact that the privilege against self-incrimination is not an automatic bar to the securing of evidence but, like other privileges, may freely be waived by the person entitled to claim it. Moreover, a claim of the privilege need not be accepted on its face. In appropriate circumstances, the court may inquire into the basis for the claim. See *Hoffman* v. *United States,* 341 U.S. 479,

[21] On the authority of the Court's statement in *Hale* v. *Henkel, supra,* there have been a number of decisions of the lower federal courts holding that an attorney cannot invoke his client's Fifth Amendment privilege. See, *e.g., Ziegler* v. *United States,* 174 F. 2d 439, 447 (C.A. 9), certiorari denied, 338 U.S. 822; *Bouschor* v. *United States,* 316 F. 2d 451, 458–459 (C.A. 8); *United States* v. *Goldfarb,* 328 F. 2d 280, 282 (C.A. 6), certiorari denied, 377 U.S. 976. Accord, *In re Fahey,* 300 F. 2d 383, 385 (C.A. 6); *United States* v. *Boccuto,* 175 F. Supp. 886, 888 (D. N.J.), appeal dismissed, 274 F. 2d 860 (C.A. 3). Contra, *United States* v. *Judson,* 322 F. 2d 460 (C.A. 9); *Colton* v. *United States,* 306 F. 2d 633, 639 (C.A. 2) (dictum), certiorari denied, 371 U.S. 951; *Application of House,* 144 F. Supp. 95 (N.D. Cal.). See also VIII Wigmore, *Evidence,* § 2270, p. 416 (McNaughton rev., 1961) ("The rule is that the privilege must be claimed personally; however, the courts, especially when the witness is a party or when the situation otherwise demands, frequently permit counsel for the witness to call the witness' attention to the privilege or to plead it in his behalf.").

486. Indeed, with respect to documentary evidence, there may be need for a factual determination whether the documents sought are the private papers of the claimant.

For all of these reasons, the claimant should be required to come forward and assert the claim of privilege himself, and to answer pertinent questions of the court and counsel concerning the factual basis of the claim. Accordingly, since there was no reason to believe that the claimant in No. 74–611 was not readily available to appear before the district court and assert the claim for himself, his attorney should not have been permitted to claim his client's privilege against self-incrimination.

CONCLUSION

For the reasons stated, the judgment of the Fifth Circuit in No. 74–611 should be reversed and the judgment of the Third Circuit in No. 74–18 should be affirmed.

Respectfully submitted.

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